STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of A.J. and M.J., Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

WAYNE JORDAN,

Respondent-Appellant,

and

REBECCA JO JORDAN,

Respondent.

UNPUBLISHED
January 22, 2002

No. 232482
Oakland Circuit Court
Family Division
LC No. 99-620385-NA

In the Matter of A.J. and M.J., Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

REBECCA JO JORDAN,

Respondent-Appellant,

and

WAYNE JORDAN,

Respondent.

No. 232522
Oakland Circuit Court
Family Division
LC No. 99-620385-NA

Before: Saad, P.J., and Bandstra, C.J., and Whitbeck, J.

PER CURIAM.

In these consolidated appeals, respondents appeal as of right from the trial court's order terminating their parental rights to the minor children under MCL 712A.19b(3)(c)(i), (g) and (j). We affirm.

We review a family court's decision to terminate parental rights for clear error. MCR 5.974(I); *In re Trejo*, 462 Mich 341, 356; 612 NW2d 407 (2000). If the court determines that the petitioner has proven by clear and convincing evidence one or more statutory grounds for termination, the court must terminate parental rights unless there exists clear evidence, on the whole record, that termination in not in the child's best interests. MCL 712b(5); *Trejo*, *supra* at 351-354.

After review of the record, we are satisfied that the trial court did not clearly err in finding that petitioner established one or more grounds for termination. The evidence showed that both respondents failed to remedy the conditions that brought the children into care, MCL 712A.19b(c)(i), that neither was able to provide proper care and custody for the children, MCL 712A.19b(g), and that the children would be at substantial risk of harm if placed with either parent. MCL 712A.19b(j). We find no merit in respondent-mother's argument that the Family Independence Agency failed to make reasonable efforts toward reunification. Further, the evidence did not show that termination of respondents' parental rights was clearly not in the children's best interests. MCL 712A.19b(5); *Trejo*, *supra* at 354. Petitioner presented clear and convincing evidence that respondents could not and did not provide the structure, consistency, attention, and discipline that the children need. Accordingly, we find no error in the trial court's decision to terminate respondents' parental rights to these children.

We also reject respondent-mother's claim that she was denied the effective assistance of counsel because the attorney appointed to represent her was not present at a pretrial hearing during which testimony was presented. The principles of effective assistance of counsel, as developed in the context of criminal proceedings, apply by analogy to proceedings involving termination of parental rights. See *In re Simon*, 171 Mich App 443, 447; 431 NW2d 71 (1988). Thus, in order to prevail on her claim of ineffective assistance of counsel, respondent-mother must show that her counsel's performance was objectively unreasonable and that the representation was so prejudicial that she was deprived of a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). To demonstrate prejudice, she must show that, but for counsel's error, there was a reasonable probability that the result of the proceedings would have been different. *People v Henry*, 239 Mich App 140, 146; 607 NW2d 767 (1999). Here, the record shows that, although not present at the hearing, counsel for respondent-mother authorized respondent-father's counsel to act in her stead during that proceeding. Respondent-mother has not identified any injurious action or inaction by substitute counsel that would support her claim that she was denied effective assistance as a result of this substitution. To the contrary, our review of the record shows that respondent-father's counsel was well aware of the facts surrounding this matter and diligently represented both respondents. Accordingly, we find no merit in respondent-mother's claim that she was denied the effective assistance of counsel.

We likewise reject respondent-mother's claim that the testimony of a psychologist should have been excluded from the dispositional hearing because he was in the courtroom when the

court delivered its findings with regard to the statutory grounds for termination. A court's decision to admit evidence at a termination hearing is reviewed for an abuse of discretion. *In re Vasquez*, 199 Mich App 44, 50-51; 501 NW2d 231 (1993). Here, although counsel noted the sequestration order and placed an objection on the record, she did not request that the testimony be excluded. Moreover, there is no indication that the psychologist's testimony was influenced by the court's findings. To the contrary, the psychologist's testimony clearly reflected his evaluation results, which were prepared before the hearing. Accordingly, there was no abuse of discretion.

We also reject respondent-mother's claim that she was entitled to a mistrial because a police witness stated that she drove respondent-father to the police station to take a polygraph. "Whether to grant or deny a mistrial is within the discretion of the trial court and will not be reversed on appeal absent an abuse of discretion resulting in a miscarriage of justice." *Schutte v Celotex Corp*, 196 Mich App 135, 142; 492 NW2d 773 (1992).

Here, the detective's reference to the polygraph was inadvertent and unsolicited. The prosecutor merely asked the detective when she met with respondent-father, a question that required a date or similar timeframe as a response. Further, there were no repeated references to a polygraph and, as noted by the trial court, there was no indication whether a polygraph test was actually administered. In sum, it is unlikely that the detective's brief reference affected this bench trial. Indeed, "[a] judge, unlike a juror, possesses an understanding of the law which allows him to ignore such errors and to decide a case based solely on the evidence properly admitted at trial." See *People v Jones*, 168 Mich App 191, 194; 423 NW2d 614 (1988). Accordingly, the trial court did not abuse its discretion in denying respondent-mother's motion for a mistrial.

In her final claim, respondent-mother argues that she was denied a fair trial because of prosecutorial misconduct. Respondent-mother relies on the psychologist's alleged violation of a sequestration order, and the prosecutor's police witness' reference to a polygraph as the factual bases for this claim. The test for prosecutorial misconduct is whether respondent was denied a fair and impartial trial. See *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). As discussed previously, respondent-mother suffered no prejudice from any violation of the sequestration order. Further, the police witness' remark regarding the polygraph was an unsolicited response to a proper question. Moreover, as previously noted, this was a bench trial and the judge, sitting as factfinder, is presumed to possess an understanding of the law that allowed him to decide this matter "based solely on the evidence properly admitted at trial." *Jones, supra*.

We affirm.[1]

/s/ Henry William Saad
/s/ Richard A. Bandstra
/s/ William C. Whitbeck

[1] Although respondent-mother, in her statement of questions presented, also raises the issue whether termination of her parental rights deprived her of her constitutional right to parent her child, she does not argue the merits of this issue in her brief other than to assert that such a right exists under our federal constitution. See US Const, Ams IX, XIV. The issue is therefore not properly before this Court and we decline to consider it. "A party may not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim." *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 178; 568 NW2d 365 (1997).